UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 08-CR-31 (LA)

JOSE CHAVEZ-RIVAS,

Defendant.

GOVERNMENT'S MOTION FOR REVIEW OF PRETRIAL RELEASE ORDER

The United States of America, by its attorneys, Steven M. Biskupic, United States Attorney for the Eastern District of Wisconsin and Assistant United States Attorney Elizabeth Blackwood, pursuant to Title 18, United States Code, Section 3145(a), hereby moves for the review of the order establishing conditions for the pretrial release of the defendant, Jose Chavez-Rivas. Said order for pretrial release was entered by United States Magistrate Judge, Aaron E. Goodstein on February 4, 2008.

Dated at Milwaukee, WI this 5th day of June, 2008.

Respectfully submitted,

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Defendant.

MEMORANDUM IN SUPPORT OF GOVERNMENT'S MOTION FOR REVIEW OF PRETRIAL RELEASE OF JOSE CHAVEZ-RIVAS

The United States of America, by its attorneys, Steven M. Biskupic, United States Attorney for the Eastern District of Wisconsin, and Assistant United States Attorney Elizabeth Blackwood, pursuant to Title 18, United States Code, Section 3145(a), hereby submits the following memorandum of law in support of the government's request for the Court to review and reverse the order establishing conditions for the pretrial release of the defendant, Jose Chavez-Rivas.

I. HISTORY OF THE CASE

On January 14, 2008, the defendant appeared in court for an initial appearance on an indictment charging the defendant with Illegal Re-entry after Conviction for an Aggravated Felony. Magistrate Judge Goodstein ordered the defendant detained. The case is scheduled for a final pretrial conference on March 27, 2008 and a jury trial on April 9, 2008.

On February 4, 2008, Magistrate Goodstein authorized the defendant's release on a $50,000 bond, with $10,000 to be posted in cash, the balance to be co-signed by the defendant's wife. The government opposed release.

II. PROFFER OF FACTS OF THE OFFENSE

According to A-file A71830839, Jose Virgen Chavez-Rivas was convicted of **Assault with**

a Deadly Weapon on January 5, 1993, and sentenced to 3 years prison in Los Angeles, CA. Chavez-Rivas was then erroneously deported to Mexico through Calexico, CA on April 30, 1994, though his request to have his case continued was granted by an immigration judge. However, after reentering the U.S. through San Ysidro, CA, and marrying a U.S. citizen, he made an Application to Register Permanent Residence or Adjust Status on August 28, 1997. He neglected to mention the conviction on the specific question asking if he had one. The application was denied on March 30, 1998.

Chavez-Rivas filled out the application again on July 27, 1998, and the application was again denied on November 20, 2003. Chavez-Rivas was thereafter charged in Washington County with **Delivery of Cocaine** on March 29, 2004, for which he received 6 years probation with one year jail as condition time. On April 19, 2005, after the issuance of a Warrant of Removal/Deportation and Warning to Alien Ordered Removed or Deported, Chavez-Rivas was removed to Mexico.

Apparently, the defendant reentered a short time later, as his probationary term for the drug case was revoked on September 30, 2005, and on November 30, 2005, Chavez-Rivas was sentenced to 3.5 years initial confinement and 3.5 years extended supervision. On December 12, 2007, an agent at the Wisconsin DOC noticed that Chavez-Rivas was an alien and due to be released on January 8, 2008, and notified ICE. Following this, the defendant was indicted in the Eastern District of Wisconsin on Illegal Re-entry after Conviction for an Aggravated Felony.

III. RELEVANT LAW

The ultimate issue in this case is whether there exists any conditions or combination of conditions which "will reasonably assure the appearance of the person as required and the safety of any other person and the community . . . ." 18 U.S.C. § 3142(e). The government bears the burden of proving by clear and convincing evidence that there are no set of conditions which will insure the safety of the community. *United States v. Portes*, 786 F.2d 758, 764 (7th Cir. 1986). The government bears the lesser burden of proof by a preponderance of the evidence in establishing risk of flight. *Id.* at 765.

IV. ARGUMENT

I. Because no combination of conditions can reasonably assure Chavez-Rivas' appearance in court if he is released, the detention order should remain intact.

Chavez-Rivas' arguments against detention focus on the availability of a cash bond, and the fact that he has a wife and children in the community. The defendant has no current employment, and no significant history of employment. The government's position, by contrast, focuses on the reality that, because Chavez-Rivas is a criminal alien, he is subject to *mandatory* deportation and no combination of conditions on his release can reasonably assure his attendance. In a very real sense, it makes no difference whether the defendant proposes one million dollars in property or cash, or a signature bond because nothing will change the fact that he will be immediately deported if released from the custody of the USMS.

In determining whether or not to detain an individual, this Court must take the following into consideration: a) the nature and seriousness of the offense charged; b) the weight of the evidence against the defendant; c) the defendant's character, physical and mental condition, family and community ties, past conduct, history relating to drug or alcohol abuse, and criminal history; and d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. 18 U.S.C. § 3142(g). But it would be meaningless to review only these factors without taking into consideration other factors that might bear on the defendant's likelihood–or, in this case, inability–to appear for trial. Here, the fact that Chavez-Rivas is facing imminent deportation by ICE upon his release from the custody of the USMS should be considered as bearing on the likelihood that he will not appear for trial after his release.

A. Releasing Chavez-Rivas on any conditions would essentially thwart the purposes of the Bail Reform Act.

The Bail Reform Act, 18 U.S.C. § 3142(e) provides, in relevant part:

> If, after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required, . . . such judicial officer shall order the detention of the person before trial.

Here, no combination of conditions on his release can assure the defendant's appearance before the district court. If Chavez-Rivas is released from the custody of the USMS, because he is an alien illegally present in this country and there is a detainer in place against him, he must be immediately transferred to ICE custody. Because the defendant is an alien who has been convicted of an aggravated felony, he is "conclusively presumed to be deportable from the United States." 8 U.S.C. § 1228(c).

Congress has placed a high priority on removal of criminal aliens. To further this purpose, 8 U.S.C. § 1228 provides for expedited removal of removal of criminal aliens. Moreover, criminal aliens are not entitled to relief from removal. 8 U.S.C. § 1228(5) ("No alien described in this section [i.e., criminal aliens] shall be eligible for any relief from removal that the [Secretary of the Department of Homeland Security[1]] may grant in the [Secretary's] discretion."). Accordingly, the defendant is no longer subject to proceedings to resolve his deportability. Because Chavez-Rivas will be removed from this country, he will be rendered unable to attend further proceedings without

[1] Pursuant to the Homeland Security Act, the former INS has been redesignated as ICE and transferred from the Department of Justice to the Department of Homeland Security. Accordingly, all references to the Attorney General in the Title 8 states cited herein are understood to refer to the Secretary of the Department of Homeland Security (the "Secretary").

committing an additional illegal reentry felony.[2]

The United States does not contend that Chavez-Rivas is presumptively subject to pretrial detention solely because he is an alien. Rather, he is subject to pretrial detention because no conditions of release can reasonably assure his attendance at future proceedings in the district court. Because he is a criminal alien, he is subject to mandatory deportation from this country and this court does not have the authority to direct ICE to stay or forego his removal. Despite the defendant's expressed intent to appear for future court appearances, once he is removed from this country, he will be unable to effectuate his own attendance.

B. Chavez-Rivas cannot be released into the United States.

Chavez-Rivas is not eligible to be released from ICE custody on bond. Section 1226 provides that certain aliens can be released on bond pending resolution of their removal proceedings. This section, however, does not apply to criminal aliens. The mandatory detention of criminal aliens has been approved by the Supreme Court. *Demore v. Kim*, 538 U.S. 510, 522 (2003) ("[T]his Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process.").

Once an alien is found deportable by virtue of having been convicted of a felony, ICE is required to detain that alien prior to his deportation. 8 U.S.C. § 1231(a)(2) ("During the removal period, the [Secretary] shall detain the alien. Under no circumstances during the removal period shall the [Secretary] release an alien who has been found . . . deportable under section 1227(a)(2) .

[2] This, in turn, would force the defendant to violate the conditions of his release. A required condition of pretrial release is "that the person not commit a Federal, State, or local crime during the period of release." 18 U.S.C. § 3142(c)(1)(A).

. . of this title.”).[3]

Moreover, Chavez-Rivas cannot be released or otherwise “paroled” into the country pending resolution of this criminal matter. ICE is permitted to release a criminal alien into society only if the release “is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or personal cooperating with such an investigation, and the alien satisfies the [Secretary] that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.” None of these circumstances applies in this case. Nothing in the statute provides authority for ICE to release a criminal alien into the country for purposes of a pending criminal charge against the alien. Because this exception does not apply to Chavez-Rivas, he must be detained by ICE.

C. ICE detention is not subject to Bail Reform Act considerations.

ICE detention is a civil mechanism incident to immigration proceedings. Detention by immigration authorities is independent and distinct from the proceedings governed by the Bail Reform Act. By its own terms, the Bail Reform Act applies only to “release or detention of a defendant pending trial,” and instructs trial courts how to address the propriety of pretrial release in the context of criminal prosecutions. 18 U.S.C. § 3142(a) (directing procedure “[u]pon the appearance before a judicial officer of a person charged with an offense”). ICE detention is a civil, not criminal, proceeding because an alien subject to deportation is not accused of any criminal offense and is not awaiting trial. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). Thus,

[3] 8 U.S.C. § 1227(a)(2)(A)(i)(II) provides that an alien who is convicted of “a crime for which a sentence of one year or longer may be imposed is deportable.”

detention related to deportation or removal proceedings, is not subject to the Bail Reform Act. Rather, it is entirely independent from pretrial detention. Moreover, in *Demore v. Kim*, 538 U.S. at 531, the United States Supreme Court held that while "detention during removal proceedings is a constitutionally permissible part of that process," detention can only continue insofar as it serves a legitimate immigration purpose. *See also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (holding that detention of alien was no longer appropriate where detention no longer served an immigration purpose because deportation was no longer feasible where no country would accept alien).

In this case, Chavez-Rivas has been served with a Notice of Intent/Decision to Reinstate Prior Order. As an aggravated felon, Chavez-Rivas is not entitled to a hearing before an immigration judge on this matter. The effect of this notice is automatic reinstatement of the prior order authorizing Chavez-Rivas's removal from the United States. Under these circumstances, indefinite detention by ICE for purposes of criminal prosecution is not authorized by law. For these reasons, the United States Attorney's Office cannot ask or instruct ICE to detain the defendant for purposes of assuring his appearance before the court in this criminal matter. Instead, if the defendant is released to ICE custody, ICE must deport him to Mexico, even if the deportation puts the defendant beyond the reach of the district court.

II. The defendant represents a danger to the community, and no amount of bond can assure the protection of the community.

The defendant has been convicted of two prior aggravated felonies. In 1993, he was convicted of Assault with a Deadly Weapon, and sentenced to prison in the State of California. Despite being deported twice, and having been denied application for Permanent Residency, based upon his marriage to a US citizen, the defendant committed a second aggravated felony, Delivery of Cocaine, in Wisconsin in 2004. Ultimately, he was also sentenced to prison on that case, and was just released from prison this year.

Other than marrying a US citizen, and producing five children with her, the defendant has done nothing productive during the approximately 15 plus years he has been illegally present in the United States. He has no significant employment history, he has a history of drug use, and his residence is unstable (he told PTS in January that his wife could not afford rent, and was living between friends).

IV. CONCLUSION

Because Congress has placed a high priority on the removal of criminal aliens such as Chavez-Rivas, ICE cannot "turn a blind eye" to the defendant's presence here in this country. The law requires that he be removed. While the defendant, or this Court, may disagree with that policy, the fact remains that no combination of conditions can reasonably assure Chavez-Rivas's appearance at future court dates.

Even in the absence of the ICE detainer, there are independent grounds for detaining Chavez-Rivas. He has a prior felony conviction for a violent crime and a prior drug-trafficking crime, both aggravated felonies. Chavez-Rivas made admissions to the pretrial services officer regarding illegal drug use. Chavez-Rivas is not a citizen. The strength of the evidence in this matter is overwhelming - it is essentially a document-driven case for which there can realistically be no defense. Chavez-Rivas faces up to twenty years in prison, and he will be immediately removed to Mexico upon completion of his prison sentence.

IV. CONCLUSION

The government asks the Court to reverse the release order of the Magistrate, and order the continued pretrial detention of the defendant.

Respectfully submitted this 5th day of February, 2008.

Respectfully submitted,

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